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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 403

ANNETTE S. LUNN,
Petitioner,

vs.

F. W. WOOLWORTH COMPANY,
Respondent.

Petition for Rehearing

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TABLE OF AUTHORITIES CITED

Cases	Pages
Connors v. Ormsby (C.C.A. 1, 1906), 148 Fed. 13	2
Fischer & Porter v. Brooks Rotameter Co. (D.C. Pa. 1952), 107 F. Supp. 1010, 1011	2
Fraver v. Studebaker Corp. (D.C. Pa. 1953), 112 F. Supp. 209, 210	2
Hansen v. Safeway Stores, Inc. (D.C. Cal. 1953) unreported	1, 2
Himes v. Chadwick (C.A. 9, 1952), 199 F.(2d) 100	1, 2
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Packwood v. Briggs & Stratton Corp. (C.A. 3, 1952), 195 F.(2d) 971, cert. den. (1952), 344 U.S. 844, 97 L. Ed. *44, rehearing denied (1952), 344 U.S. 882, 97 L. Ed. *62	1, 2
Prepayment Car Sales Co. v. Orange County Traction Co. (C.C.A. 2, 1915), 221 Fed. 939, cert. den. (1915), 238 U.S. 626, 59 L. Ed. 1495	2
Refrigeration Patents Corp. v. Stewart-Warner Corp. (C.C.A. 7, 1947), 159 F.(2d) 972, cert. den. (1947), 331 U.S. 834, 91 L. Ed. 1847, rehearing denied (1947), 332 U.S. 803, 92 L. Ed. 382	2
Ryan v. Caley (C.C.A. 3, 1945), 147 F.(2d) 138, cert. den. (1945), 325 U.S. 859, 89 L. Ed. 1979	2
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No. 403

ANNETTE S. LUNN,
Petitioner,

vs.

F. W. WOOLWORTH COMPANY,
Respondent.

Petition for Rehearing

Annette S. Lunn respectfully petitions this Court to grant a rehearing of the order entered November 30, 1953, denying her petition for writ of certiorari.

Mrs. Lunn submits that intervening circumstances of substantial effect justify the grant of the writ. The petition in this case was filed on October 9, 1953. On October 23, 1953, the United States District Court for the Northern District of California, Southern Division, cited and relied upon the instant opinion of the Court of Appeals[1] as blanket

1. As well as *Packwood v. Briggs & Stratton Corp.*, 3 Cir., 195 F.(2d) 971 and *Himes v. Chadwick*, 9 Cir., 199 F.(2d) 100.

authority for the entry of a motion for a directed verdict. This appears from a Memorandum For Judgment in *Hansen v. Safeway Stores, Inc.*, a certified copy of which accompanies this petition as "EXHIBIT A".

Thus the vicious trend toward the abolition of the jury verdict in patent infringement actions pointed out in the petition has continued to grow and has become firmly entrenched since Mrs. Lunn filed her petition. This Court has become the only available forum to put a stop to such unconstitutional practice.

This petition is a plea for this Court to give concrete effect to its motto "Equal justice under law" appearing on the architrave of its building. The word "law" embraces the law of patents, as well as the bill of rights. The bill of rights grants every person, including a patentee, the right to trial by jury and the right to common law review.

The lower courts have abandoned the bill of rights in favor of the unanimous view[2] that patentees and their

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2. A roll-call of the circuits establishes this fact beyond peradventure.

The *First* Circuit: *Connors v. Ormsby* (C.C.A. 1, 1906), 148 Fed. 13.

The *Second* Circuit: *Prepayment Car Sales Co. v. Orange County Traction Co.* (C.C.A. 2, 1915), 221 Fed. 939, cert. den. (1915), 238 U.S. 626, 59 L. Ed. 1495.

The *Third* Circuit: *Ryan v. Caley* (C.C.A. 3, 1945), 147 F.(2d) 138, cert. den. (1945), 325 U.S. 859, 89 L. Ed. 1979, and *Packwood v. Briggs & Stratton Corp.* (C.A. 3, 1952), 195 F.(2d) 971, cert. den. (1952), 344 U.S. 844, 97 L. Ed. *44, rehearing denied (1952), 344 U.S. 882, 97 L. Ed. *62. See also *Fischer & Porter v. Brooks Rotameter Co.* (D.C. Pa. 1952), 107 F. Supp. 1010, 1011; and *Fraver v. Studebaker Corp.* (D.C. Pa. 1953), 112 F. Supp. 209, 210.

The *Seventh* Circuit: *McIlvaine Patent Corp. v. Walgreen Co.* (C.C.A. 7, 1943), 138 F.(2d) 177; and *Refrigeration Patents Corp. v. Stewart-Warner Corp.* (C.C.A. 7, 1947), 159 F.(2d) 972, cert. den. (1947), 331 U.S. 834, 91 L. Ed. 1847, rehearing denied (1947), 332 U.S. 803, 92 L. Ed. 382.

The *Ninth* Circuit: *Himes v. Chadwick* (C.A. 9, 1952), 199 F.

patent property are in a special category which falls outside the guarantees granted by the bill of rights to all other litigants and protecting all other forms of property. But the people who are governed by law continue to put their trust in the Constitution, in the statutes authorizing the grant of patents, and in the law which provides that enforcement of the grant may be decided by a jury verdict.[3]

This Court has never granted certiorari to any patentee where the record, as here, furnishes a sound basis for urging that the petitioner has been denied her constitutional right to a jury trial, and to a common law review of her verdict. But in the last 13 years alone, this Court has granted certiorari in at least 24 other cases involving such varied types of actions as anti-trust actions, actions in deceit, war risk insurance policy actions, personal injury actions, and Federal Employers Liability Act actions[4], all as appears from the appendix to the original petition. In each of those 24 cases, this Court preserved to the successful plaintiff the fruits of his jury verdict. The public policy in protecting a patentee against transgressions should be

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(2d) 100, and again in the decision in this case. See also the intervening *Hansen* case.

The *Fourth*, *Fifth*, *Sixth*, *Eighth* and *Tenth* Circuits have apparently been silent on this question. But, one might well expect them to follow the trail blazed by the other Circuits.

3. Last year alone, patentees contributed over 40,000 new inventions to the American public. Patent No. 2,580,379 was issued January 1, 1952 (654 O.G. 68) and patent No. 2,624,045 was issued December 30, 1952 (665 O.G. 1624). These contributors should be given the rights guaranteed by the Constitution and afforded to all other litigants.

4. The "indifferent or unfriendly" attitude which had permeated the Federal Employers Liability Act cases with "a philosophy hostile to that reflected in the legislation" referred to by Mr. Justice Douglas in his Cardozo lecture (49 Col. Law Rev. 735, 752) is also found in the Patent Act cases.

as great as that in protecting other classes of litigants against their transgressors.

Patentees should not be required to await a possible future conflict between two different circuits on the same patent. Such a conflict has not occurred in a half century of certiorari review. Reason suggests very little likelihood for any such conflict in the future. In view of the unanimity between circuits set forth in footnote 2, such a conflict has now become a practical impossibility.

Petitioner respectfully submits that the grant of certiorari in the instant case would go far to reassure all patentees that they, too, shall have "equal justice under law", and that they have not been segregated as the only class of litigant to whom the bill of rights is a mere scrap of paper.

An editorial in the December, 1953 issue of the American Bar Association Journal, Vol. 39, page 1085, summarizes:

> "Trial by jury has been for centuries a bulwark in the Anglo-Saxon administration of justice. The jury system is not perfect but it is the best yet devised."
>
> "And so we suggest to those who would tamper with it or abolish it altogether, that they think seriously and move slowly, with care."

Wherefore, Mrs. Lunn respectfully requests a rehearing of the order denying her petition for writ of certiorari, and respectfully requests this Court to grant the writ as prayed for in the petition on file herein.

Respectfully submitted,

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The undersigned hereby certify that the foregoing PETITION FOR REHEARING is presented in good faith and not for delay, and that the petition for rehearing is restricted to the grounds above specified.

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CARL HOPPE
Attorneys for
Annette S. Lunn

(Exhibit A follows)

EXHIBIT A

In the United States District Court, for the Northern District of California, Southern Division

Alden Hansen, Plaintiff, vs. Safeway Stores, Incorporated, Defendant.	No. 31449

MEMORANDUM FOR JUDGMENT

The defendant has moved for judgment under the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, after the jury was discharged because it was unable to agree upon a verdict. A motion for a directed verdict was made at the conclusion of the testimony, and ruling on this motion was reserved under the provisions of the Rule.

The court rules that as a matter of law the motion for a directed verdict should have been granted because plaintiff's patent is invalid for lack of novelty, lack of invention, or lack of both novelty and invention. In this situation it is the duty of the court to direct the entry of judgment in accordance with the motion for a directed verdict. *Packwood v. Briggs & Stratton Corp.*, 3 Cir. 195 F.2d 971; *Himes v. Chadwick*, 9 Cir., 199 F.2d 100; *Lunn v. F. W. Woolworth Company*, 9 Cir., ... F.2d ....., No. 13266, decided June 29, 1953.

Counsel for the defendant is ordered to prepare and submit a judgment in accordance herewith.

Dated: October 23, 1953.

OLIVER J. CARTER
United States District Judge

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